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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1111

JEHOVAH'S WITNESSES in the State of Washington, et al.,

Appellants,

vs.

KING COUNTY HOSPITAL UNIT NO. 1 (Harborview), et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' PETITION FOR REHEARING

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APPELLANTS' PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Now come appellants, within the time extended by the order of the Court, and file this their petition for rehearing. They show unto the Court as follows:

I. Every child in the United States and every parent in the United States, regardless of religious or medical persuasion or place of residence, has suffered a loss from the summary decision of the majority of this Court. Every American family is party to this litigation.

The refusal of this Court to protect family privacy in this case has placed in jeopardy every family and every child in this country.

The effect of the decision of the majority of this Court is to remove the checks and balances that parental love and discretion provide against medical abuses. If parents who are Jehovah's Witnesses cannot decline for their children the surgical procedure of blood transfusion, on the same principle, neither can any other American parents decline for their children any other surgical procedures whether they be abortions, transplants, removal of organs, sterilization, needless surgery or treatment of an experimental character whether the doctor involved is competent or incompetent.

Every child in the United States and every parent in the United States regardless of religious or medical persuasion or place of residence, has suffered a serious loss from the summary decision of this Court. Let no one make the mistake of regarding this decision as one that solely affects Jehovah's Witnesses. In fact every American family is a party to this litigation. It has far-reaching implications and once the dike is breached there will be no stopping the flood!

The problem is not new. Since colonial times legislators and courts have tried to protect families against the restless encroachments of professional men seeking to impose their will on parents. Applicable American colonial law is found in "An Abridgment of the Laws in Force and Use in Her Majesty's Plantations; (Viz.) of Virginia, Jamaica, Barbadoes, Maryland, New-England, New-York, Carolina, &c." (Printed in 1704) Herein, under the section on the laws of New England, at page 23;

> "An Abridgment of the Laws and Ordinances of New-England. Chyrurgeons and Midwives: No Surgeon Midwife or Physitian, may upon the Body of any

person perform any Operation, Cure or Practice of Art, tho never so agreeable to the Rules of Practice, without the consent of the Patient, if they be Mentis Compotes, and of their nearest Relations, if they be not. *Nor upon the Body of any Child, without the consent of the Parents or Guardian of the said Child.*" (Italics added)

Do the American citizens of the latter part of the twentieth century have less rights than they did under the oppressions of colonialism?

The decision of the majority of this Court affirming without argument the court below is changing the law which has stood for at least two and a half centuries. Surely briefing and argument are in order before making such drastic changes! This is not the place for summary decision.

The right of every parent, every child and every family in this country is in question. Do parents still have jurisdiction to make decisions within the family circle? Has family life in the United States, the acknowledged backbone of society, now disintegrated to the point where the Supreme Court will suffer a serious invasion of it without so much as allowing briefs and argument in its defense?

II. In the history of this Court there have been occasions when erroneous theories of constitutional law have been adopted with serious results to the nation. Such erroneous decisions have had to be rectified later at great cost. The present case which has been summarily decided without a hearing is an example of an historic error which will have to be corrected eventually. Appellants earnestly urge this Court to correct it *now before* irreparable harm has resulted.

(a) *This is the sixth time this issue has been placed before this Court; such a recurrent controversy deserves a hearing and decision, not summary decision.*

This is the sixth occasion this emotion-charged issue has been placed before this Court.[1] No hearing has yet been granted. The issue is extremely serious. It has broad and far-reaching implications which appear to have been overlooked, otherwise a majority would have joined with Mr. Justice Douglas and Mr. Justice Harlan.

The Court is reminded of the emotion-charged flag salute controversy, involving Jehovah's Witnesses. Six times it came before the Court. The ultimate decision, in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, (1943), is acknowledged as a classic decision in the entire history of this tribunal. Four times the issue was dismissed without so much as a hearing. The fifth time there was one dissent: *Minersville* v. *Gobitis,* 310 U. S. 586, 601 (1940), Mr. Justice Stone dissenting. Cf. Frankfurter J., *West Virginia* v. *Barnette, supra,* p. 646. In the interim between *Gobitis* and *Barnette* hundreds of mobs, tremendous unrest and great public controversy and disturbance resulted.

In *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), the Court adopted the theory of separate but equal treatment for Negroes, over the strong dissent of the first Mr. Justice Harlan. The erroneous theory ultimately had to be abandoned. (*Brown* v. *Board of Education,* 347 U. S. 483 (1954)) But look at the national tragedy and cataclysm that has resulted from the shortsighted view originally taken of this issue!

Consider also the license tax controversy. In *Jones* v. *Opelika,* 316 U. S. 584 (1942), this Court allowed the li-

[1] *People ex rel. Wallace* v. *Labrenz,* 411 Ill. 618, 104 N. E. 2d 769, cert. denied 344 U. S. 824 (1952); *State* v. *Perricone,* 37 N. J. 463, 181 A. 2d 751 (1962), cert. denied 371 U. S. 890 (1962); *Application of the President and Directors of Georgetown College, Inc.,* 331 F. 2d 1000, rehearing *en banc* denied 331 F. 2d 1010 (D. C. Cir.), cert. denied 377 U. S. 978 (1964); *Raleigh Fitkin–Paul Morgan Memorial Hospital* v. *Anderson,* 42 N. J. 421, 201 A. 2d 537, cert. denied 377 U. S. 985 (1964); *United States* v. *George,* 239 F. Supp. 752 (D. Conn.), appeal dismissed, No. 30014, 2d Cir., Oct. 5, 1965, cert. denied 382 U. S. 1010 (1966).

cense tax to be imposed on itinerant evangelists. In *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943), the view expressed one year earlier was reversed and the tax held unconstitutional. But in the meantime 2,500 arrests of Jehovah's Witnesses had taken place and irreparable damage had been done, with great public disturbance. Rejecting without a hearing a serious and recurrent controversy is damaging to the law and to the nation itself.

The words of the law writer Vattel on the *Law of Nations* (London, Sweet-Stevens, 1834) constitute a timely warning to those whose obligation it is to guard the law of the nation:

> "But this constitution is a mere dead letter, and the best laws are useless if they be not sacredly observed . . . To attack the constitution of the state and to violate its laws is a capital crime against society; and if the persons who are guilty of it are those in authority, they add to this crime a perfidious abuse of the power confided to them. . . . The constitution and the laws of a State are rarely attacked from the front, it is against secret and gradual attacks that a nation must chiefly guard. Sudden revolutions strike the imaginations of men; their history is written, and their secret sources are made known, but changes are overlooked when they come about insensibly by a series of steps which are scarcely noted."

The family is the acknowledged backbone of society. Here there is an attack on it. It masks itself with the pretense of being in the public interest and for the protection of helpless children. Let us not allow the emotional pull of this pretense to obscure reality, i.e., a lawless and capricious invasion of the most precious and sacred human rights.

Mr. Justice Sutherland, dissenting, in *Associated Press* v. *N. L. R. B.,* 301 U. S. 103, 141 (1937), said:

> "Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship. . . .? If so, let them withstand all *beginnings* of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." (Italics added)

The beginning of encroachment, as usual, is against an unpopular minority. Has the majority of the Court really considered where this leads? The effect of this decision is to remove the checks and balances that protect children from invasion of the family circle.

In *Mapp* v. *Ohio,* 367 U. S. 643, 647 (1961), this Court reaffirmed what was said in *Boyd* v. *United States,* 116 U. S. 616, 630 (1886):

> "The Court noted that 'constitutional provisions for the security of person and property should be liberally construed . . . It is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' . . .
>
> "In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that 'independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.' I Annals of Cong. 439 (1789)."

With Mr. Justice Brandeis, appellants respectfully remind the Court, "The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding." (Dissent, *Olmstead* v. *United States,* 277 U. S. 438, 479) This dissent has now become the law of the land; *Katz* v. *United States,* 389 U. S. 347 (1967).

(b) *Jehovah's Witnesses are a peaceful, non-violent, law-abiding people only seeking to be left alone to care for their own families. How can the Court reject without a hearing such a vital and important appeal?*

Is there merit in violence? Surely it is not necessary in order to have your case briefed and argued in this Court to be found among violent demonstrators, murderers, robbers and rapists and other persons convicted of crime! Are peaceful, conscientious, law-abiding American citizens the ones whose constitutional questions are to be refused a hearing by this Court?

This Court was sufficiently concerned and properly so to grant briefing and argument to *Escobedo* convicted of murder; *Gideon* convicted of breaking and entering; *Miranda* convicted of kidnapping and rape; *Mapp* who was in possession of pornographic literature; *Barber* who was convicted of armed robbery: *Escobedo* v. *Illinois,* 378 U. S. 478 (1964); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Miranda* v. *Arizona,* 384 U. S. 436 (1966); *Mapp* v. *Ohio,* 367 U. S. 643 (1961); *Barber* v. *Page,* 36 Law Week 4329, decided April 23, 1968.

This Court granted full briefing and argument and wrapped the mantle of constitutional protection around those who did not wish to register firearms, instruments of violence. (*Haynes* v. *United States,* 390 U. S. 85 (1968)) Similarly in *Marchetti* v. *United States,* 390 U. S. 39 (1968), constitutional protection was given to a gambler who did not wish to incriminate himself by revealing his occupation.

In all the foregoing cases involving criminal activity the Court granted a hearing. Appellants do not disagree with what the Court has done in aforesaid situations but feel they, as law-abiding American citizens, equally deserve a hearing. Should respectable people have their constitutional rights invaded and their own children snatched away in "kangaroo" hearings with the same infirmities this Court condemned in In re *Gault,* 387 U. S. 1, 28

(1967), and yet be dismissed from the Court on a summary decision without even an opportunity to be heard?

Surely respectable, upright people, fighting for their family privacy and for their own children, the most precious rights of humankind, deserve full hearing and argument!

III. A juvenile court decision made without a hearing and by denial of due process is a nullity, as this Court has decided in *Gault*. Yet the District Court in this case has bottomed its decision on a series of proceedings in the state juvenile courts which were a total judicial nullity. Thus the whole foundation of the District Court decision is destroyed and the decision appealed from stands as wholly insupportable. The affirmation by the majority of this Court is equally insupportable.

(a) *This Court has clearly stated in Gault that juvenile courts cannot act in defiance of the Constitution. Accordingly this Court cannot adopt and approve as unassailable proceedings which totally fail to meet the standards which the Court says are required.*

In In re *Gault*, 387 U. S. 1, 30 (1967) (fn. 46), this Court made it very clear that juvenile courts are obliged to maintain standards of proper procedure and "it cannot act with unbridled caprice."

The Court adopted the comment of Mr. Justice Douglas made in *Haley* v. *Ohio*, 332 U. S. 596, 601 (1948): "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."

The decision of the Court in In re *Gault* said at pp. 17, 18:

> "Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. . . .

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: 'The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts.' . . ."

The Court concluded:

> "Under our Constitution the condition of being a boy does not justify a kangaroo court."—Page 28.

A "kangaroo" court in the State of Washington which denies due process of law stands no higher than a similar court in Arizona. The District Court in the case at bar has shown clearly that there was *not even one single case* in the state court that came within hailing distance of procedural respectability. Every decision based on an improper hearing is a nullity! Every case in the record below suffers from the same infirmity! But in spite of this, the District Court has treated such proceedings as respectable and unassailable upon which to found its decision. In consequence the essential facts relied on by the District Court are wholly without foundation.

This Court cannot condemn farcical juvenile court proceedings as something the Constitution does not countenance in *Gault* and then turn around in this case and adopt without question a whole series of such cases as a solid foundation for decision. When a majority of this Court affirmed the District Court, this series of nullities is what was adopted.

(b) *The juvenile court decisions in the State of Washington have all been found wanting in due process. Decisions made without hearing, without notice, without counsel, without adverse witnesses are a nullity. Yet the District Court has treated as sacrosanct and unassailable these farcical juvenile court proceedings.*

The District Court in its decision has analyzed the records of the state juvenile court which were before it. Of the proceedings in the state court it was said:

> "In none of the cases is it recorded that the judges heard contrary medical testimony relating to the risks involved in blood transfusions. Little, if any, notice was given to the parents of the children regarding the hearing to determine if the children were 'grossly and wilfully neglected as to the medical care necessary to their well-being.' No notice was given in the Seelye case; it is not apparent from the record whether the parents of the Pen and Brockman children were given any notice or were present at the hearing; the Smiths were given one hour notice of the hearing. Blood transfusions were actually administered to the Nichol child before the hearing was completed and the court order making her a ward of the court was signed." (App. to Jur. Statement 39a)

The foregoing analysis makes it evident that no proper trial of the issues involved was given in any instance at all.

Even more infirmities are revealed by the stipulated facts. Judge Leahy of Chelan County has an announced policy of authorizing the seizure of children of Jehovah's Witnesses without notice and without trial. (App. to Jur. Statement 51a) Judge McGovern announced to appellant Gene Hardy on the telephone that custody of his child was being taken from him. It was the first the father had heard about it. (App. 75a-76a). Martha Ridge, an adult, found out on the radio the next day that a proceeding putting her in someone else's custody had been held without her knowledge the previous day. (App. 19a)

The trial court has found that six out of the ten cases in the state court failed to give notice. (App. 77a) In no case was counsel present nor was any opportunity afforded to produce contradictory testimony. Nor did the witnesses ever testify to the dangers of the proferred treatment.

A wholly one-sided presentation was made in every instance.

The District Court was prepared to excuse the failure to observe due process on the ground that there was a "sincere belief that the urgency of the situation required expedited action." (App. 77a) In other words they had a sincere belief that the requirements of due process and a fair hearing should be suspended. Evidently the trial judge had the same idea in the *Gault* case. Can the Constitution be suspended because a trial judge feels that due process would take too long? Does an allegation of emergency repeal the Constitution?

While recognizing the inadequacy of the state court proceedings the District Court nevertheless politely treated them as being beyond criticism. While there was no counsel, no notice, no cross-examination, no opportunity to contradict and no testimony of the dangers, the District Court found no cause for criticism, but merely adopted the state court view stating: "Defendant Superior Court Judges in all situations described in finding of fact XV granted the orders requested only after receiving the testimony or examining the verified petitions of physicians to the effect that an emergency existed which necessitated a court order to preserve and protect patient's life, and blood transfusions were authorized by said defendants only where they concluded the welfare of minor children was involved." (App. 78a)

But the so-called evidence was in no case tested by cross-examination. One-sided, emotional, midnight, ex parte hearings, trials over the telephone—this is testimony? This is evidence? This is a hearing? This is proof of "necessity"? This is proof of anything?

It is obvious from an analysis of the facts of record that the trial court has not relied on the evidence. It started off with a series of assumptions and they have substituted for evidence. There is not the slightest criticism of any-

thing that has been done by any of the defendants. After analyzing the "kangaroo" hearings in the juvenile court of the State of Washington, the District Court said: "they concluded the welfare of minor children was involved."

Without a hearing they cannot in law be deemed to "conclude" anything! But these farcical proceedings are treated with "full faith and credit" like the Constitution had never been written.

The state courts gave no real hearing. The District Court adopted without serious study the state court decisions. Now the Supreme Court has affirmed summarily and this travesty of justice becomes law without the issues ever receiving a proper judicial analysis.

(c) *The summary decision of the majority in this case is totally at variance with the Court's own decisions in Gault and Haley. Such contradictory holdings on the same issue cannot be allowed to stand without full briefing and argument.*

No tribunal can allow its decisions to stand which decisions clearly contradict each other. It was decided in In re *Gault*, 387 U. S. 1, 28 (1967), that the Constitution prevents juvenile courts from conducting capricious kangaroo hearings. See also *Haley* v. *Ohio* 332 U. S. 596, 601 (1948).

But the District Court has adopted as respectable and unassailable authority a series of juvenile court hearings that procedurally no one could seriously attempt to justify. Violation of the Constitution is excused on arguments of "emergency" and the good intentions of the appellees. Does violation of due process of law become more respectable when done by state judges and professional men who should know better?

This Court would not stand by to see the Constitution violated by well-intentioned judges and social workers in the cases cited *supra*. How can it with propriety adopt and

affirm the flagrant flouting of due process of law that is evident in the proceedings in the state juvenile court in this case?

This case has been dealt with in the press and in the lower courts with so much emotion that the serious issues involved have never been seriously examined in the light of law and reason. Appellants earnestly plead with the majority of this Court to grant them a real *judicial* hearing, the first one they have ever had.

IV. The greatest fallacy in this entire controversy is the common assumption which was adopted by the trial court that blood transfusion is a treatment of minimal danger and unquestioned value and there is no substantial medical opinion to support the view that there are adequate alternatives.

(a) *The finding of fact by the trial court that it is the "prevailing medical view" that blood transfusions are not only safe but necessary is a broad assumption without real foundation.*

The "prevailing medical view" is not sacrosanct and beyond question, nor does it make the law. In this situation the "prevailing medical view" has been roundly condemned by those who are truly knowledgeable in this field.

The "prevailing medical view" does not make the law: the true question is, "Do the facts of record support the correctness of what the doctors have done beyond all reasonable doubt and is it established there is no alternative?"

It will be recalled that for a considerable period the "prevailing medical view" authorized the use of thalidomide for pregnant women. All will remember what happened to that "prevailing medical view"! It will also be recalled that for a considerable period bloodletting was the "prevailing medical view": Can we not be glad the courts did not decide to make that "prevailing medical view" compellable by law?

Prevailing medical views' change quite rapidly. What place is there for trying to set them in the concrete of the law?

Since the trial court has felt that blood transfusions are safe enough to be forced on other people's children, consider the following comment from the well-known surgical work *Complications in Surgery Management* (Saunders & Co., Philadelphia, 1961): Under the heading "Cumulative Mortality from Complications of Blood Transfusions":

> "The annual mortality from only 3 complications of blood transfusion (hemolytic reactions, overload and serum hepatitis) is computed to be 16,500. Although some assumptions used in arriving at this figure may be challenged, one cannot dispute the fact that there is a tremendous loss of life and induced illness from this procedure, which is intended to be therapeutic. In terms of disability and loss of life the sequelae of blood transfusions rival some of our major public health problems,"[2] (p. 80)

Note the further comment: "one cannot dispute the fact that there is a tremendous loss of life and induced illness from this procedure." The foregoing is a standard medical work, it was offered as an exhibit to the trial court and refused. How can anyone reasonably say in the face of this information that "blood transfusions are not only safe but necessary"? Would 16,500 dead patients annually indicate a "safe but necessary" therapy?

Prominent medical writers even plead with their medical brethren to stop the craze of blood transfusions. Dr. Walter Alvarez, well-known medical columnist, Emeritus Consultant, Mayo Clinic, said on June 25, 1965:

> "In recent years, there has been a craze for giving blood transfusions when the patient could have recovered without it.

[2] U. S. Department of Health, Education and Welfare, National Office of Vital Statistics, Vol. 50, No. 1, Jan. 9, 1959.

"For several years, some leading experts on blood diseases have been begging doctors not to order a transfusion unless it is very necessary.

"In an uncomfortably large number of cases, they say, all that happens is the person gets an attack of serum hepatitis - an often serious or even fatal inflammation of the liver." (Syndicated column quoted from the Vancouver *Sun*)

Is it the function of the courts to force on objectors that which prominent doctors call a "craze"? Appellants and their children do not have to wait till the inertia of organized medicine becomes sufficiently motivated to come up to date. They can refuse this treatment now.

The same writer, Dr. Alvarez, later emphasized the dangers involved in blood transfusions and the refusal of doctors generally to stop the craze for blood, caused by overselling this treatment to the public. In his column of January 31, 1967, he states:

"BLOOD TRANSFUSIONS CAN BE PERILOUS

"I must keep saying here that in recent years my medical brethren have gotten a tendency to give blood transfusions that are not necessary to save the patient's life.

"In recent years our great blood specialists have been begging us doctors not to order transfusions unless they are absolutely necessary. As the experts say, 'When you perform a brief, not very bloody operation, such as a curettement of the womb, don't give the woman a pint of blood. First, the woman does not need the blood in order to survive, and if she did need blood, a pint would not be enough to save her. All then that the giving of a pint accomplishes is to enable the woman in two months to get a very severe serum hepatitis—a virus infection of the liver which not infrequently causes death.'

"Curiously, these warnings of our leading professors of hematology do not seem as yet to have had any effect, and so today, in some well-run hospitals, there is a transfusion committee of men who review the cases in which blood was given, and perhaps ask a physician why he gave a pint to a man who was not serious ill.

"A good friend of mine, a very able teacher of medicine, one day bled from his stomach. Because I know that such bleeding can come with an emotional upset, I probably would just have asked him what terrible anxiety had come to him the day before, and then I would have tried to help him settle the question of what to do about the annoyance or worry. With this, the bleeding would probably have stopped. But one of the man's doctor friends gave him a transfusion of blood. Two months later I heard he had a severe destruction of his liver, and a few days later I was shocked to hear that he was dead.

"People ask me, 'But why then do you doctors keep ordering many thousands of transfusions a year?' Probably because many of us are so full of zeal that we tend to 'overtreat;' we want to be sure we did everything possible for our patient.

"Also, today, with so many damage suits being filed against physicians, many an M.D. orders laboratory tests, X-ray studies and treatments—mainly so that if called into court, he cannot be accused of having been negligent in his care of the complainant." (Syndicated column from the Miami *News*, January 31, 1967)

Some of the dangers of blood transfusion might be acceptable as a calculated risk if it could be demonstrated that there is some corresponding proof of lifesaving. Dr. Bruce Chown, eminent writer on this subject, challenges the transfusionists to produce proof.

"At least half of all transfusions are unnecessary; personally I think the proportion is much higher than

that. . . . What is the proof that more than a small fraction of the blood that is daily poured into patients in the operating room alters the prognosis for the better? Blood has always had a mystical quality; its use in the operating room is more often mystical than scientific. . . . I would hazard the guess that not 5%—no, not 1%—of transfusions so given (to women) have been lifesaving. And I would hazard the guess too that at least as great percentage has been deathdealing."—CAN. M. A. J., Vol. 77, p. 1037.

So if blood transfusions are dangerous and the best and most respected medical writers estimate that their value is doubtful and they are probably killing as many as they are curing, then what is the point of carrying on this type of therapy? *A fortiori* where do they find any sensible basis for making blood transfusions obligatory as a matter of law?

Consider also the article by Dr. Wm. H. Crosby of Walter Reed Army Institute of Research, Washington, D.C., writing on *"Trends in Blood Transfusion"*:

"It will take some time and effort to rid our medical culture of the unfounded hope that transfusion is a tonic, or that it may reduce toxicity or hasten convalescence or improve wound-healing."—ANNALS OF NEW YORK ACADEMY OF SCIENCES, Vol. 115, p. 399, 1964.

The above opinions reveal from the analysis of specialists that both the public and the medical profession have been oversold on the value and necessity of this therapy. Why should an objecting minority have such treatment forced upon them?

At one time it was thought that certain types of serious surgery would be impossible without blood. But when certain prominent surgeons were persuaded to try, surprising success resulted.

On March 18, 1968, the following article on heart surgery appeared:

"Dr. Denton A. Cooley, who has performed more than 4,000 open-heart operations, said today's open heart surgery patient is kept on the operating table for a much shorter period of time, and the massive blood transfusions of the past have been replaced by glucose and water solutions.

"'This is a particular boon to the patients who refuse blood transfusions,' explained Dr. Cooley, who is professor of surgery at Baylor University College of Medicine. 'The Jehovah Witnesses, for instance, believe that to take a blood transfusion goes against the advice found in the Old Testament, and would deny them entry into the kingdom of heaven.

"'A total of 28 of these Jehovah Witnesses underwent open heart surgery at Baylor University Hospital without the aid of blood transfusions, And only four of them died,' he added.

"'In the early days, open heart surgery involved the use of large quantities of blood transfusions,' he explained....

"'Instead of taking several hours to perform a clotting technique inside the heart, we found the same thing could be accomplished by developing an operative plan beforehand. In this way the operation took only 15 to 30 minutes. The patient naturally tolerated the shorter operation far better. And there were fewer complications.'

"Dr. Cooley said 'a total of 4,000 open heart surgery operations have been performed at my hospital (Baylor) using the glucose methods.'"—*Times-Picayune*, New Orleans, March 18, 1968.

See also the article by the same surgeon entitled "Open Heart Surgery in Jehovah's Witnesses," AMERICAN JOURNAL OF CARDIOLOGY, 1964, p. 779.

Another prominent heart surgeon recently ackowledged the contribution Jehovah's Witnesses have made to improve techniques for open-heart surgery:

"In discussing open heart surgery and blood transfusion, Dr. Charles P. Bailey, of New York City, said 'if a surgeon can safely perform open heart surgery without the aid of blood transfusions, it certainly is better for the patient.'

"Dr. Bailey said researchers hit upon substitutes for blood transfusions while trying to help out the Jehovah Witnesses.

" 'Because of our experience with Jehovah Witnesses, a faith which does not accept blood transfusions, we had to learn how to do open heart surgery without blood transfusions,' the surgeon explained. . . .

"Dr. Bailey said 'we've also learned how to help the open heart surgery patient tolerate the blood loss.' This, he explained, is done with the aid of certain fluids such as a mixed salt solution or a glucose solution.

"At Tuesday's session the New York surgeon reported on a series of 10 open heart operations in which blood transfusions were not used.

" 'Seven of our patients were Jehovah Witnesses,' he explained. 'The remaining three were of other faiths. Results in all cases were effective.'

"Dr. Bailey said blood transfusions often have definite disadvantages.

" 'To begin with a blood transfusion is similar to an organ or tissue transplantation in that it brings with it an inherent risk of incompatibility, major or minor,' he explained. 'Then there's always the chance of transmitting some disease such as hepatitis, malaria or syphilis.'

"The surgeon said sometimes a blood transfusion will so sensitize a patient his body is not able to accept a

transplanted organ such as a kidney transplant." —*Times-Picayune,* New Orleans, February 1, 1968.

The District Court has found that "according to the overwhelming weight of nonsectarian medical opinion, in certain situations there are no substitutes for blood or blood derivatives." The JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION has come out with statements to the contrary as recently as October 23, 1967:

> "The use of Ringer's lactate solution has become as acceptable as whole blood in shock and surgery patients."—J. A. M. A., Vol. 202, p. 32.

While the state courts in the cases below ordered blood or plasma transfusions, the National Research Council has now recommended that plasma transfusions "be discouraged and even discontinued."

In the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION April 8, 1968, pp. 21-22, appeared the following:

> "NRC Committee Discourages Use
>
> "Pooled Plasma May Transmit Hepatitis
>
> "New evidence that pooled human plasma readily transmits hepatitis has led a National Research Council committee to recommend that its clinical use 'be discouraged and even discontinued.'
>
> "An estimated 300,000 units of pooled plasma are used annually in the United States.
>
> "Since 1953, the Division of Biologics Standards of the National Institutes of Health has required manufacturers to include a warning of possible hepatitis transmission on pool plasma labels or circulars . . .
>
> The National Research Council Committee on Plasma and Plasma Substitutes accepted this explanation. In recommending against continued use of whole, pooled plasma, it acknowledged that it had judged the preparation relatively safe as late as 1958. . . .

"Fever, chills, and allergic reactions are common following plasma infusion, the committee added."

This treatment by plasma, condemned by the National Research Council, is the very treatment the juvenile courts in Washington now approved by the District Court has been forcing on the helpless children of Jehovah's Witnesses.

Have the majority justices really contemplated the monstrosity of the scandal they have approved when allowing the helpless children of Jehovah's Witnesses to have forcibly imposed on them treatment which stands condemned by the most powerful medical body in the United States?

Up-to-date medical information favors the view of appellants. Why should the juvenile court judges undertake to practice medicine and to force on people inferior and dangerous treatment? Under what legal principle is such arbitrary power found?

Attention is drawn to In re *Gault,* 387 U. S. 1, 19 (fn. 25): "The judge as amateur psychologist, experimenting upon the unfortunate children who must appear before him, is neither an attractive nor convincing figure."

The judge, as an amateur physician experimenting on other people's children, is not very attractive to appellants either.

This whole area of the law badly needs serious study and review by this Court. Its substantiality is not open to question. This case is eminently one where the Court should grant a rehearing and allow full briefing and argument.

(b) *The District Court, apparently relying on its own assumption in favor of appellees has not so much as mentioned in its findings the substantial contradiction of the view adopted by the District Court.*

Every experienced lawyer and judge knows the difference between substantial evidence and tissue-paper evi-

dence. The trial court ignored the substantial evidence of four experienced doctors, with a combined total of well over 100 years of practice, and refused to accept learned treatises which would have shown the true state of medical opinion. Instead it accepted at trial the tissue-paper evidence of one young doctor of only 10 years' experience who was allowed to state the opinion of the whole medical world. This young man was neither a surgeon nor a hematologist. Dr. Giblett, an employee of the blood bank also testified over objection what the whole medical world is alleged to believe.

They cannot have it both ways. In one breath substantial medical treatises showing the dubious state of medical thinking are rejected; in the next breath one doctor is allowed to speak for the medical world by giving his opinion of what other people think! The approach of the District Court has been to fly in the teeth of the weight of unimpeachable evidence.

Dr. Gale Wilson, chief pathologist for the coroner's office of King County (Seattle) has no axe to grind. He is obviously a serious medical practitioner who is deeply concerned about what he sees happening with the use and abuse of blood transfusion. He testified as follows:

(a) *Deaths caused by blood transfusion.*

"Q Would you indicate please to the Court, Dr. Wilson, if you can, the frequency with which you have observed these terminal cases resulting from blood transfusions?

"A It is very difficult to give a positive answer. In the type of work that I do we see a variety of cases. Sometimes you will see two or three in one day in which in retrospect or in talking to the attending doctor I feel that transfusion, overload in particular, has been probably the factor that turned the scales against the person.

"I would think that all in all I would see two or three cases a week in which over use or injudicious use of blood was a factor in causing a person's death.

"Q Now, you say injudicious use, Doctor. Are there any real clear guide lines as to what is judicious as opposed to non-judicious use of blood, for instance?

"A No, sir." (Tr. p. 100 lines 3-19)

Two or three deaths in one day in one community should be enough to demonstrate that this treatment by blood transfusion is not the panacea it is commonly represented to be.

(b) *Other fluids used for transfusion are often superior.*

"Is there any other means or solution in common medical use for transfusions that would be . . . more or less dangerous than the use of blood for transfusions?

"A There are many substances which are more instantly, more readily, available and in many instances less dangerous.

"In other words, if the occasion is instant we can always have salt solution or glucose in water or glucose mixed with other chemicals somewhat simulating the blood picture which can be given at any time, anywhere, any place without going through all of the formality of typing and mixing, which can restore the volume and as I have said earlier, if the volume is overrestored, they can be eliminated by the kidneys." (Tr. p. 111 lines 3-18)

(c) *There are always alternatives.*

"JUDGE BEEKS: Are you saying, Doctor, that there are no circumstances that justify a blood transfusion medically?

"THE WITNESS: Absolutely no, I am not saying that, your Honor. I am saying that there are circum-

stances where I would use it and I have used it. There are circumstances where I think it is very desirable, but, there are many alternative methods some of which, maybe more than some of which, may have less danger than utilizing whole blood." (Tr. p. 112 lines 13-21)

"Q Well then, in a sharp situation, such as you have mentioned, outside of irreversible shock, are there alternative means of treating the patient other than by means of blood transfusions?

"A Yes, sir." (Tr. p. 111 lines 19-23)

(d) *No one can state that a patient will die without blood transfusion.*

"JUDGE HAMLEY: Would you go so far as to say that there are cases where it is reasonably indicated to save life?

"THE WITNESS: As I have said earlier, your Honor, I don't know. Upon the basis of my training and my feeling I would say there are instances in which I have felt it was life saving. On the other hand I have used it a number of times when I felt it should have been and the patient didn't survive. So I can't say that it is a panacea, that stating if this patient does not get it they are going to die, because often they won't." (Tr. p. 113 lines 2-12)

In the light of this information, it is obvious that the emotional, midnight hearings, where doctors assure judges that a child is surely going to die without a blood transfusion, are being guided more by imagination than medical indications.

(e) *Blood therapy has been oversold both to the profession and the public.*

"Q Now, Dr. Wilson, is it to your knowledge that blood transfusion is quite commonly used in medical treatment?

"A Very.

"Q You say 'very'; would you regard this practice as being, perhaps, under-used or over-used so far as you can see the value of it?

"A I would say it is greatly overused. The public and the medical profession are greatly oversold on it." (Tr. p. 115 lines 8-16)

"Q And that—would you care to comment and say whether you agree or disagree with that one particular paragraph there and, if so, in what way?

"A Well, I agree with what he says here that at least half, if not more, of the transfusions are unnecessary." (Tr. p. 119 lines 19-23)

"A Well, he raises the question of why do you transfuse and what is the proof that a small fraction of the blood is necessary.

"I raise those same questions and I agree with him.

"Q Agree with him what, that they are questions or—

"A That they are questions and that we don't know the answers." (Tr. p. 120 lines 11-18)

DR. EXNER:

"Q Is it your view then, Dr. Exner, that blood is used properly or overused in the field of medical treatment in this area?

"A It is both grossly overused and grossly misused.

"Q Dr. Exner, do you have an opinion as to whether or not blood transfusions can be proved to save lives?

"A I do.

"Q Would you tell us, please, and explain to the Court what your opinion is and how you arrive at that?

"A Fundamentally, the hardest thing we ever do is to prove what would have happened if things had been

different. As a result of that fundamental proposition nobody can say with absolute assurance that any patient, anywhere, anytime who lived after having had a blood transfusion would necessarily have died without it.

"We, as doctors, most of us, and I concur to some extent, have a very strong opinion that on some occasions, at least, blood transfusions do save lives.

"I am not at all sure we know which those occasions are and, as I say, we can not be sure that there are any. On the other hand we know without any question of doubt that thousands of people are killed every year by blood transfusions and it is a reasonable certainty that far more are so killed than we know about. So what is in fact happening when we recommend a blood transfusion is that we are balancing an opinion that blood transfusions sometimes save lives against the absolute certainty that in thousands of cases it causes death and where that is the case in my opinion as a physician and should we say as a philosopher it is improper to insist that anyone accept our unsubstantiated opinion against the known facts.

"For that reason I believe, if for no other, that there can be no justification for a physician ever insisting that his opinion with regard to the probable value of a blood transfusion in a particular case be accepted. I think we have to adopt a certain attitude of humility whereby we recognize that, being human, we may be wrong." (Tr. p. 190 line 2 to p. 191 line 13)

(f) *There are always alternative treatments that can be used.*

"Q Now, Dr. Wilson, broadly, could you tell the Court whether or not you could think of any medical situation where there simply are not alternatives except blood transfusions?

"A If you have a situation where there is no alternative, that patient is going to be dead before you do anything.

"I can see a situation in which you have a severed aorta but by the time you do anything that patient is dead anyhow. It would be much better to try to load them up with glucose, dextrose, plasma, and try and get some volume back. Blood could come later but I can't see where it is that instant." (Tr. p. 120 line 24 to p. 121 line 11)

DR. EXNER:

"Q Now, Dr. Exner, could you perhaps mention to the Court some of the areas in which blood transfusion is ordinarily used and whether in your opinion there are acceptable and medically approved alternative remedies for these problems?

"A Well, among the foremost places where blood is used is to combat hemorrhage, either hemorrhage from a wound or very commonly hemorrhage into the gastrointestinal tract from, say, a bleeding ulcer or some comparable condition.

"Another way that it is used is in an attempt to combat anemia.

"Now, those are two entirely different propositions.

"In the case of hemorrhage you are trying to maintain blood volume. In the case of anemia you are trying to maintain oxygen carrying capacity.

"In both cases there are alternative methods which can be used instead of blood transfusion. I can go into that, if you wish, but the plain fact is that there are alternatives." (Tr. p. 206 line 13 to 207 line 7)

"A (Interposing) A much more commoner one is the one you mentioned which is bleeding from an ulcer and, in the case of bleeding from an ulcer, there has over the years been a violent difference of opinion

within the medical profession as to whether patients got along better with or without a blood transfusion.

"There is good reason to believe that the transfusion aggravates the very process that it is intended to combat and there is recent medical evidence that people with a bleeding ulcer do much better with volume expanders than they do with blood transfusions. The blood transfusions combat the normal body process of trying to stop the hemorrhage.

"Q Now then, would you say in relation to the gastrointestinal bleeding that there is alternative treatments of blood transfusion?

"A There is alternative treatment to blood transfusion which many people think is very much better.

"Q Now, when you say 'many people' are you speaking—

"A (Interposing) Within the medical profession and I am not speaking of people with religious prejudices against blood transfusion who might be considered biased. I am talking about competent medical opinion entirely aside from any other pressure." (Tr. p. 208 line 4 to p. 209 line 2)

Compare the same view confirmed by Dr. Wilson. (Tr. p. 106 lines 1, 2)

(g) *There is alternative treatment that can be used in cases of newborn babies.*

"Q Now then coming to one of the next items you mentioned, which was erythroblastosis, the curnicteris—

"A I did not mention it by that name but that is the name.

"Q That is one of the expressions that is used for this blood problem of new born babies, is that right?

"A That is right.

"Q Now, coming to that, would you please tell the Court if this be so whether or not there is any alternative treatment in relation to that particular problem?

"A Well, yes. There are alternative treatments. In the first place there are no reliable criteria as to when a transfusion might be needed if indeed there ever such a need for such transfusion.

"The high bellarubin content of the blood is a necessary cause of this condition we know as curnicteris but it is not in itself a sufficient cause and what the other causes are and what part they play is largely unknown, very much a matter of dispute, and it is presently generally agreed that we have no reliable criteria by which to decide when and whether a blood transfusion is needed.

"There are alternatives. In the first place the most recent one is reported within the last few months where it has been found that the use of phenobarbital acts as an aid to the action of enzymes which destroy the excess bellarubin. That is one which is brand new. How valuable it is remains to be determined but at least it offers a new method." (Tr. p. 209 line 3 to p. 211 line 5)

The foregoing evidence has been disregarded by the trial court. It has instead adopted the view enunciated in the ex parte state court proceedings. The state court proceedings were much simpler—only one side got heard. That is why the case has had to be brought before this Court. Appellants are asking the Court to consider for the first time the real case on the record, absent convenient assumptions.

(c) *Twelve child cases are mentioned in the record where doctors alleged blood transfusions were needed. Six recovered without blood; five recovered with blood; one died after blood transfusion—so what is proved?*

As heretofore observed, the judgment of the District Court rested heavily upon the ten petitions presented by the doctors (orally or in writing) alleging that unless the children described and named in said petitions were given blood transfusions, they would die. Yet the children Russell Scott Maydole, Jeffrey Ward Elam, Heidi Jo Lawrence, Jeanetter Smith and Laurin Hardy recovered from their illnesses *without* such transfusions. The children Bradley Scott Seelye, Thomas Allen Burnitt, Michael Pen, Sharilyn Brockman and Geri Lynn Nichol were given blood transfusions pursuant to court orders obtained, and such children recovered also. (R. 928-948)

Two other cases appear in the record: Daniel Wayne Brockman was alleged to require blood transfusion at birth. He did not receive it and recovered without it. No petition to court was made. (App. 68a) An earlier child of Laurin Seelye and Geraldine Seelye received an exchange transfusion without a court order and died. (App. 51a)

In all there were twelve children all alleged to be in grave danger if no blood was administered. Six were transfused; six were not. Six who were not transfused all recovered. Five who were transfused recovered; one died. The medical allegations had to be wrong at least 50% of the time. They may have been wrong the other 50% too! All those not transfused lived—how can anyone prove that the others would not have survived if left alone?

So what has been proved by this evidence: nothing really. Only by relying on assumption can any real conclusion be drawn. Assumptions based on one-sided midnight hearings make a very weak basis for decision in any serious tribunal.

In the face of the obvious uncertainty in this whole situation, what is the point of anyone seriously pretending that this practice is so sure and indisputable that a parent becomes negligent merely by disagreeing with one doctor in a field where the doctors cannot agree among themselves?

Appellees' case can only stand if they are allowed to buttress it with assumptions and emotion and then ignore the weaknesses in their evidence.

V. This Court has affirmed the District Court in this case, simply adopting by reference the decision of *Prince* v. *Massachusetts*, 321 U. S. 158. The *Prince* decision was based on the ancient and confused doctrine of *parens patriae* which this Court has recently discredited in In re *Gault*, 387 U. S. 1, and *Kent* v. *United States*, 383 U. S. 541.

(a) *The substantive reasoning upon which Prince was founded, i.e., parens patriae, has been rejected in Gault and Kent.*

The term *parens patriae* is ancient in law, but not necessarily honorable. In times past its uncertainty has been helpful in masking unconstitutional infringements. But this Court has in recent years brought this ancient anachronism out into daylight and showed that it is a very dubious foundation upon which to rest the many claims that have been made under it.

In *Gault, supra,* at p. 30, the Court said:

> "In *Kent* v. *United States, supra,* we stated that the Juvenile Court Judge's exercise of the power of the state as *parens patriae* was not unlimited. We said that 'the admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness.'"

At p. 16 the Court said:

> "These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."

But it is the doctrine of murky meaning and dubious antecedent that the Court has in effect adopted when reliance was placed on *Prince* to decide summarily this appeal.

The magic words *parens patriae* no longer justify violation of constitutional law. Nor does this ancient doctrine now have any real validity.

But in the *Prince* case to which this Court referred in affirming summarily the decision below, the basis of the decision was the since-discredited *parens patriae* doctrine. (Opinion of the Court, 321 U. S. at p. 166) The result is that the Court has rejected this old theory on one hand and adopted it by reference on the other. The Court can hardly condemn *parens patriae* in one case and give it respectability in another. The law must have more consistency than that.

(b) *Prince was a 5-4 decision of dubious authority from the day the decision was rendered.*

The *Prince* decision was a paradox in the records of this Court from the day decision was entered. In the previous term in *Murdock* v. *Pennsylvania*, 319 U. S. 105, (1943), the Court had held that the evangelistic work of Jehovah's Witnesses was not subject to commercial licensing, that exchange of money "does not transform evangelism into a commercial enterprise. If it did, then the passing of a collection plate in church would make the church service a commercial project." The activity was described as "an age-old form of missionary evangelism . . . as evangelical as the revival meeting." (Pp. 108, 109, 111)

Following the *Murdock* decision, it was decided in *Prince* that commercial child labor laws could be applied to voluntary nonprofit participation in this noncommercial activity. The reasoning of the Court in *Prince* is strained,

and the dissenting opinions are much more in keeping with the spirit of the Constitution and the liberties that this Court has constantly tried to protect.

For one thing *Prince* is ripe to be overruled. But even treating it totally as an authority, its ratio is far removed from the problem in this case. It simply has no application.

A difficult case of this kind in an area which has not been seriously studied in the entire history of this Court is not a situation for proliferating errors by summary judgment, relying on weak and inapplicable cases. The subject matter of this case is too important. The high standard of consistency and concern for individual liberties which has justifiably been the pride of this Court, will stand shattered and perhaps permanently damaged were the Court to refuse the rehearing which the appellants herein urge with the utmost earnestness.

Conclusion

The subject matter of this case is fraught with much emotion and misunderstanding. That is why the whole subject will not be really understood until it is fully briefed and argued. This Court and its fearless defense of the Constitution has been a great bulwark against the constant demands by officials for more power.

Appellants believe there is here a dire need for careful judicial analysis and that on full briefing and argument the Court will see the importance of the principles involved and the correctness of the position taken by appellants.

Wherefore appellants pray that the order heretofore entered herein affirming the judgment of the court below be set aside and held for naught, that this petition for rehearing be granted and that the Court grant jurisdiction

and set the case down for oral argument. Appellants pray for such other relief to which they may show themselves justly entitled in the premises.

JEHOVAH'S WITNESSES IN THE STATE OF WASHINGTON, et al., *Appellants*

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Certificate

I, Victor V. Blackwell, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done and not for the purpose of delay.

VICTOR V. BLACKWELL